92-729

Supreme Court, U.S.
FILED
OCT 22 1992
OFFICE

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

PATRICK J. DOHERTY,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Circuit Courts of Appeals can lawfully reject a clear and unambiguous 1982 holding of the United States Supreme Court interpreting the Uniform Commercial Code as it exists in all fifty (50) states of the Union and adopt the Justice Department's contrary position redefining federal criminality of overdraft check writing conduct.

2. Where the indictment filed against a criminal defendant fails to fairly apprise him of the essential elements of the crime with which he is charged; the key pattern Federal Criminal Jury Instructions of the Seventh Circuit on point is discarded by that Circuit without prior notice; and the indictment to which the defendant was originally required to plead was

phrased in the ***conjunctive*** rather than the ***disjunctive;*** has the defendant been unconstitutionally denied "due process"?

3. Whether the United States Circuit Court of Appeals for the 7th Circuit overreached its proper authority in reversing the District Court's sentence imposed under the Federal Sentencing Guidelines without regard for the "due deference" and "clearly erroneous" standard of *18 U.S.C. §3742(e).*

PARTIES

The petitioner in this court is Patrick J. Doherty, who was the defendant-appellant in the proceedings below. The respondent is the United States of America, Justice Department.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Patrick J. Doherty, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in this proceeding on July 24, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit entered herein, affirmed in part and reversed in part the judgment of the United States District Court for the Eastern District of Wisconsin in the cause entitled *United States of America v. Patrick J. Doherty*.

It is published in 969 F.2d 425 (7th Cir. 1992) and is reprinted at pp. 1 through 9, inclusive, of the Appendix to this Petition.

The Memorandum Decision of the District Court on a Motion to Dismiss Indictment in the cause rendered on June 17, 1991 is unreported, but is reprinted at pp. 21 through 25 inclusive, of the Appendix to this Petition.

JURISDICTION

Jurisdiction of the District Court was invoked by the plaintiff, United States of America, pursuant to *18 U.S.C. 3231* and *18 U.S.C. §1344*.

Jurisdiction of the United States Court of Appeals for the Seventh Circuit was invoked by the defendant pursuant to *28 U.S.C. §§1291* and *1294*, and by the plaintiff pursuant to *18 U.S.C. §3742(b)(2)*.

The United States Court of Appeals for the Seventh Circuit issued its opinion on July 24, 1992 affirming in part and vacated in part the judgment and underlying related decisions of the United States District Court for the Eastern District of Wisconsin in this cause. Rehearing was not sought.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit is invoked pursuant to *28 U.S.C. §1254(1)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V: "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due

process of law ...."

United States Constitution, Amendment VI:
"In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ... and to have the Assistance of Counsel for his defense."

Federal Rule of Criminal Procedure 8:
"**(a)Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. (emphasis added)

Title 18 U.S. Code Section 13.44:

Whoever knowingly executes, or attempts to execute, a scheme or artifice --

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S. Code Section 3742(e):

(e) Consideration. Upon review of the record, the court of appeals shall determine whether the sentence -

(1) was imposed in violation of the law;

(2) was imposed as a result of an incorrect application of the sentencing

guidelines;

(3) ...

(4) ...

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts. (emphasis added)

Title 28 U.S. Code Section 994(j):

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a

crime of violence that results in serious bodily injury.

SYNOPSIS

A. NATURE OF THE CASE

This is a criminal case in which the defendant was charged with defrauding a federally insured banking institution by writing checks on such bank(s) with insufficient funds in his account(s) when written. This appeal centers on whether the acts alleged in the indictment and attributed therein to the defendant constituted an offense under the laws of the United States as a matter of law.

B. DISPOSITION IN TRIAL COURT

On or about February 21, 1991, an indictment was filed in the district court charging the defendant with violating *18 U.S.C. §1344*. On March 22, 1991, the defendant appeared before the court and

entered a plea of **not** guilty to the charges in the indictment. On May 9, 1991, a Motion to Dismiss Indictment was filed by the defendant accompanied by a supporting memorandum of law. On June 17, 1991, following a full briefing schedule, the District Court issued an Order denying the defendant's Motion to Dismiss.

On July 29, 1991, based upon the District Court Order of June 17, 1991, the defendant, by written plea agreement, entered a conditional plea of guilty pursuant to *Federal Rule of Criminal Procedure 11(a)(2)*, expressly reserving the right to appeal from the district court's rulings of June 17, 1991 which had denied defendant's Motion to Dismiss. On October 1, 1991 a judgment of conviction and sentence was entered herein by the District Court. A Notice of appeal was filed on behalf of the defendant three days later, on October 3, 1991.

Subsequently, on October 10, 1991 the government filed a Notice of Appeal on October 10, 1991.

C. DISPOSITION IN COURT OF APPEALS

The U.S. Court of Appeals for the Seventh Circuit decided that the defendant was correct in his contention that *18 U.S.C. §1344* "... establishes two distinct, albeit closely related, offenses: (1) schemes to defraud financial institutions and (2) schemes to obtain money, etc. from financial institutions by false pretenses, representations or promises." [969 F.2d at 427]

The Court of Appeals also agreed with the defendant that the indictment was legally insufficient to charge an offense under *18 U.S.C. §1344(2)* in that the only conduct alleged was the writing of a series of NSF checks (i.e. "check-kite"). [969 F.2d at 128]

However, the Court of Appeals proceeded to define "check-kiting" as follows:

> "Check kiting, at root, is a plan designed to separate the bank from its money by tricking it into inflating bank balances and honoring checks drawn against accounts with insufficient funds." [969 F.2d at 428]

The Court of Appeals then rejected its own pattern jury instruction defining "scheme to defraud;" ignored the plain requirement of Rule 8(a) of the Federal Rules of Criminal Procedure that indictments set forth separate offenses in separate counts; and ruled that the indictment was sufficient to state a criminal offense without distinguishing the explicit rejection of that exact argument by the United States Supreme Court in *Williams v. U.S.*, 458 U.S. 279, 102 S.Ct. 3088, 73

L.Ed.2d 767 (1982).

In addition, the Court of Appeals granted the government's appeal of the sentence imposed and remanded for further consideration of the fact situation under the "more than minimal planning" enhancement provision. In doing so it recited as established fact events which were not contained in the indictment; the plea agreement; or reflected in evidence anywhere in the proceedings below.

The U.S. Court of Appeals found "clear error" in the District Court's decision not to grant the government "bonus points" on its "more than minimal planning" theory. The Court of Appeals in so ruling found as a matter of law that the Guidelines "... direct district courts to impose the enhancement of the offender's crime involved repeated acts over a period of time, unless it is clear that each instance was purely opportune." [969 F.2d

at 429] The U.S. Court of Appeals made no mention of the express requirement under *18 U.S.C. §3742(e)* that it: (a) accept findings of fact by the district court unless clearly erroneous and (b) give due deference to the district court's application of the guidelines to the facts. Nor did the Court of Appeals consider that its actions in vacating the sentence amounted to substituting its judgment for that the District Court without a hearing or evidence and without considering the guiding principles of *18 U.S.C. §994(j)* relating to non-imprisonment of first offenders.

REASONS FOR GRANTING THE WRIT OVERVIEW

The Justice Department has refused to accept the decision of this Court in *Williams v. U.S.*, 458 U.S. 279, 102 S.Ct. 3088 (1982) that the intentional writing

of overdraft checks does not constitute a federal offense of bank fraud under the applicable sections of the Uniform Commercial Code. Ever since that time it has relentlessly attempted to foist its view of what the law of that case should have been upon its prosecutors and the judiciary of the United States. For some reason the Justice Department is not willing to accept the policy decision of the United States Supreme Court that "garden variety" NSF check cases are to be left to the province of the court system of the several states.

It's first line of attack was an attempt to persuade Congress to pass legislation which would override the *Williams* decision. The net result was *18 U.S.C. §1344* which did not in any way change the core ruling in *Williams* that under the Uniform Commercial Code a check is not a statement or a representation but

is merely a direction to one's bank to pay money. If a bank chooses to honor an overdraft item it has made a loan.

Many states have statutes which explicitly make it a crime to intentionally write a check on an account containing insufficient funds to cover the item. The United States does not. If Congress had intended to do so at the time of enacting *18 U.S.C. §1344* in 1984 it could easily have done so but it did not. Indeed, Congress' own practices in this regard would certainly appear in retrospect to support this private citizen defendant's position that no Congressional intent to outlaw "check-kiting" can be inferred from the 1984 passage of *18 U.S.C. §1344*, which was simply a reiteration of the exact language of the mail fraud and wire fraud statutory language as applied to federal banks.

The second line of attack by the Justice Department has been a series of prosecutions in the various Circuits for "check-kiting" under *18 U.S.C. §1344*. Appellate decision in these cases attempt to correlate the Justice Department's position that *Williams* has, in effect, been overturned by the passage of *18 U.S.C. §1344*; the statutory language of *18 U.S.C. §1344*, and the core holding of *Williams* that a bare check-kite scheme in and of itself, does not rise to the level of federal bank fraud.

In the case at bar, the net result was an indictment returned in 1991 for conduct in 1987, which indictment failed to adequately apprise the defendant of the elements of the charge against him under F.R.Cr.P. 8(a).

The indictment reads in the **conjunctive**; whereas the law reads in the disjunctive. The government persuaded the

district court that the bare fact of intentionally over drafting a checking account, which is all that is alleged in the indictment, was sufficient to state a crime under *18 U.S.C. §1344*. As such, the defendant had no defense. He knowingly wrote checks without funds in the drawer account and his banker voluntarily covered the overdrafts. Under the government's theory that is all that is necessary to convict. It was irrelevant that he had purchased marketable securities from the brokerage firms named as payees on the subject checks, which liquid assets were available to cover the checks if need be. It was irrelevant that the banker reviewed the defendant's account status daily and was fully aware that overdraft items were being covered on the basis of his customer's general credit worthiness.

Under the government's simplistic approach we are probably all guilty of

federal bank fraud at some time or another if we have ever written a post-dated check, or mailed a check in anticipation of depositing a check later in the same day to cover it. This is the core problem with the government's case. The criminality of conduct turns purely upon prosecutorial whim and, in Doherty's case, the vagaries of the stock market.

From a legal defense perspective, this defendant was improperly charged under F.R.C.P. 8(a) because in order to accommodate the government's position at all, the Court of Appeals had to concede that *18 U.S.C. §1344* contains two separate and distinct crimes. Yet, Doherty was charged with **one** set of crimes, all alleged in the conjunctive. At a minimum, the Sixth Amendment requires that a defendant be sufficiently informed of the nature and cause as to intelligently enter a plea with effective assistance of

counsel. The indictment here utterly fails that threshold under any reading of the Court of Appeals decision and F.R.Cr.P. 8(a).

As a final matter, the district court held a lengthy hearing at the time of sentencing. It carefully received all the facts and legal arguments of counsel. It then rendered a decision on the appropriate sentence to be imposed, correctly reciting both the prosecutor's view and the defense view of the Sentencing Guidelines. The court chose a result in points that was above that sought by defense counsel and below that sought by the government.

Disgruntled with the result, the government appealed and succeeded in persuading the Court of Appeals to substitute its judgment for that of the District Court. The case illustrates the extreme tension between the Court of

Appeals and the District Court which the sentencing guidelines have created, which has been exacerbated by the aggressiveness of the government in seeking to impose its views of literal application of every phrase of the guidelines upon the district courts.

STATEMENT OF FACTS

The uncontroverted facts alleged in the indictment (but not the legal conclusions asserted therein) are taken as true for the purposes of this petition. The indictment refers generally to a series of checks written and deposited by Patrick J. Doherty between November 5, 1987 and December 2, 1987. It is uncontroverted that at the time the specific checks identified in the indictment were written by Mr. Doherty, he did not have sufficient collected funds in the bank accounts upon which they were

drawn to pay them. The government contends and the courts below have ruled, that these facts, standing alone, constitute all that is necessary to allege and prove bank fraud under *18 U.S.C. §1344(1)*.

At the plea hearing the government recited all of the evidence upon which it would rely to prove the offense. [R-27; Transcript of July 29, 1991 Hearing pp. 6-14] The entirety of the evidence of the offense consisted of a number of checks and two bank accounts. Accordingly, this is a pure document case, with no allegations or proof of any false or fraudulent verbal or written statements of any sort - other than the check instruments themselves.

On July 29, 1991 a formal written plea agreement was entered into between the government and the defendant in order to crystallize the facts for purposes of

appeal. The government recited the allegations of the indictment and identified the representative illegal act(s) upon which it relied to base the conviction. The defendant, under a specific reservation of his right to appeal whether such conduct was criminal under *18 U.S.C. §1344* and his right to contest sentencing issues, entered a conditional plea of guilty. [R-18]

Paragraph 10 of the Plea Agreement identifies that on November 6, 1987 Patrick J. Doherty wrote check number 2351 on his account number 55-40-3252 at the Hartland branch of the Valley Bank in the amount of $27,123.32 and deposited it into his other account number 22-25-6319 at the M&I Marshall & Ilsley Bank in downtown Milwaukee, Wisconsin. Although not recited in the indictment or in the Plea Agreement, it is conceded by Mr. Doherty that he did not have $27,123.32 in his

Valley Bank account at the time he deposited Valley Bank check number 2351 into his M&I account. However, it is also uncontested that on that date Mr. Doherty owned 1,000 shares of Chrysler Corporation common stock, held in street name for him by the Milwaukee brokerage firm of Dominick & Dominick [see Exhibit B to October 1, 1991 Sentencing Hearing] which shares had been purchased for him and held for him on October 30, 1987 at $27.00 per share. He also owned 2,000 additional shares of Chrysler Corporation common stock, held in street name for him by New England Securities, the brokerage arm of Mr. Doherty's employer, New England Life Insurance Company. These latter shares, which had been purchased in two groups of 1,000 at 241/4 and 261/2 respectively, were liquidated at a net profit by him on November 13, 1987 at 261/4 for some $52,140.

Thus, for purposes of this petition, the operative facts are that the defendant wrote insufficient funds checks on one bank account to another in connection with his account purchase of publicly traded securities, on credit, in the ordinary course of business, so as to utilize the "float" between the time of initial issuance of the first check(s) and presentment for payment of the second check; all at a time that he was nominal owner of shares of stock worth approximately the value of the checks when written for their purchase.

The indictment and plea agreement relied upon by the government do not include all of these facts because it is the government's contention that the records of the brokerage firms are irrelevant, as are any acts by the M&I Bank in knowingly honoring overdrafts drawn by Mr. Doherty on his bank account.

[See R-28; Transcript of October 1, 1991 Hearing p. 36]

ARGUMENT

I. THE LEGAL ELEMENTS OF "CHECK-KITING" AS AN OFFENSE UNDER 18 U.S.C. §1344 ARE UNCONSTITUTIONALLY VAGUE AND UNCERTAIN.

A. INTRODUCTION

This case illustrates what happens when prosecution under a non-specific criminal statute such as *18 U.S.C. §1344* depends upon the complexities of the Uniform Commercial Code governing banking transactions. If one reads the indictment (or the plea agreement) and deletes the legal conclusions thrown in, the facts alleged do not describe federally proscribed criminal conduct. The indictment alleges the writing of checks between two accounts and fails to state

anywhere that the defendant was without sufficient resources ultimately to honor the checks if either bank dishonored the items when presented.

If Congress had enacted a specific statute, as many states have done, criminalizing the intentional writing of overdraft checks under certain circumstances, this case would not be here. However, if we did not know before October of 1991 that Congress itself does not view chronic over drafting of bank accounts as a criminal offense, we certainly do know that now. (And the Justice Department itself recently has issued letters exonerating these acts from criminal prosecution.) Something much more serious than writing insufficient funds checks or utilizing the "float" between issuance and final payment is necessary to comprise "bank fraud" under *18 U.S.C. §1344*. In defendant's Memoranda

of Law to the trial court in support of his Motion to Dismiss the Indictment, counsel for the defendant identified these missing elements as: (a) some act of fraud or deceit in addition to the mere writing and depositing of checks and (b) lack of available resources to honor dishonored instruments by the maker.

B. THE INDICTMENT FAILS TO DESCRIBE FRAUDULENT CONDUCT WHICH IS REQUIRED FOR VIOLATION OF *18 U.S.C. §1344*, AS A MATTER OF LAW.

Section 1344 of Title 18 of the United States Code provides:

> Whoever ***knowingly*** executes, or attempts to execute, a ***scheme*** or artifice --
>
> (1) ***to defraud*** a financial institution, **or**
> (2) ***to obtain any of the moneys,*** funds, credits, assets, securities, or other property owned by, or under the custody or control of, a

financial institution, ***by means of false or fraudulent pretenses, representations, or promises;***

shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both. (emphasis added)

The elements of this offense must be gleaned from the plain language of the statute itself and by reference to the pattern instructions used for the identical operative provisions of *18 U.S.C. §1341* and *18 U.S.C. §1343*, the "mail fraud" and "wire fraud" statutes.

Thus, the elements of the offense charged are:

(a) knowing participation in a scheme to defraud a financial institution; **or**

(b) knowing participation in a scheme to obtain moneys from a financial institution by means of false pretenses or

misrepresentations.

The core problem with this case, however, from the prosecution's perspective is the fact that Mr. Doherty is not alleged to have engaged in any acts other than the writing of several overdraft checks between two banks. Such activity on his part, as a matter of settled law, does not constitute a statement or representation of fact, either express or implied, as to the status of his bank accounts to anyone.

While at first reading, this statement may appear less than credible, the United States Supreme Court expressly and unequivocally settled this basic issue under the provisions of the Uniform Commercial Code in *Williams v. U.S.*, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982). [See also discussion in *H. Bailey, Brady on Bank Checks*, §17.15 (6th Ed. 1987]

This key holding in the *Williams* case by the U.S. Supreme Court is highly relevant because there are no facts presented in the instant indictment of any false verbal or written statements made by the defendant to the affected banks, or to any person whatsoever. The indictment presents only the conjunctive assertion that the acts of writing and depositing the checks identified in the indictment, constituted the "scheme to defraud" **and** the "scheme to obtain money by false, and fraudulent representations."

The *Williams* court, in ruling on this core issue, relied upon the *Uniform Commercial Code §3-104(2)(b)* which defines a check as simply "... a draft drawn on a bank and payable on demand ...." As such the Court found that a check merely reflects "... an unconditional promise or order to pay a sum certain in money," citing *U.C.C. §3-104(1)(b)*. Further, the

Court found that the drawer, by writing the check "... engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder", citing *U.C.C. §3-413(2)*. However, on the specific issue of criminal liability, the Court noted that *U.C.C. §3-409(1)* provides that:

> "A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." [See: *Williams v. U.S.*, 258 U.S. at 285, 73 L.Ed.2d at 773]

In reliance upon these sections of the Uniform Commercial Code, which is now adopted in all fifty states of the union,[1]

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[1]/At all times relevant hereto, Wisconsin had adopted each of these provisions verbatim. See *Wis. Stat. §§403.104(1)(b); 403.104(2)(b); 403.409(1); 403.413(2).*

the Supreme Court concluded:

> Although petitioner deposited several checks that were not supported by sufficient funds, that course of conduct did not involve the making of a "false statement," for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." [*Williams v. U.S.*, 458 U.S. 279 at 284, 73 L.Ed.2d 767 at 773]

More importantly, this Court in *Williams, supra*, went on to hold:

> Petitioner's bank checks served only to direct the drawee banks to pay the face amounts to the bearer, while committing petitioner to make good the obligations if the banks dishonored the drafts. **Each check did not, in terms, make any representation as to the state of petitioner's bank balance.**

(emphasis added) 458 U.S. at 284

It is exactly this basic point of commercial law that the government will not accept. It charges in its indictment that the defendant's deposit of insufficient funds checks "artificially inflated the actual balances of money on deposit in his personal checking accounts." [Indictment Paragraph 6, App. p. 31] And it is exactly this erroneous point of commercial law that the Court of Appeals was persuaded to adopt below by the government. In its opinion below the Circuit Court of Appeals ruled:

> Check kiting, at root, is a plan designed to separate the bank from its money by tricking it into inflating bank balances and honoring checks drawn against accounts with insufficient funds. [969 F.2d 428]

The Supreme Court opinion in *Williams* recognized and discussed the plausibility of the foregoing analysis, that a drawer of a check is generally understood to be representing that he has funds on deposit to cover the face value of the check, thus inflating his bank balance. However, this Court expressly rejected that exact interpretation as **not** "... the preferable or intended one." [*Williams*, 458 U.S. at 285-286, 73 L.Ed.2d 767 at 773]

The Uniform Commercial Code, the law which governs the legal status of all negotiable instrument transactions in every bank and business in this country, provides that a check is not a "statement" that funds are in the account upon which it is written. [See: *U.C.C. §3-104(2)(b); §3-104(1)(b); §3-413(2); §3-409(1)*]

As recognized by the United States Supreme Court, it is not a matter of

federal criminal law but rather a matter of Uniform Commercial Code law that:

> "... technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." [*Williams v. U.S.*, 458 U.S. 279 at 284, 73 L.Ed.2d 767 at 773 (1982)]

No drawee bank is liable on an instrument until it "accepts" the instrument. [*U.C.C. §3-409(1)*] That bank can decide to "accept" or "reject" an item based upon whether it has "collected funds" to pay from its customer's account, **or** it can choose to honor the draft based on "uncollected" deposits in its customer's account. In the latter case, it has chosen to honor potential overdrafts by, in effect, making a loan to its customer until he can cover any shortage.

That is what occurred here - not a federal crime. One federally insured bank (M&I) covered overdrafts of its commercial customer, Mr. Doherty, as a matter of business courtesy. Mr. Doherty's personal bank (Suburban State) had decided to go on a "collected funds only" basis without telling him in advance. While this was certainly that bank's prerogative, it caused a number of Mr. Doherty's checks he had already written to "bounce" while Suburban State withheld credit for stock sales proceeds checks he had deposited into their bank until those broker's checks to him "cleared" the broker's New York bank. Indeed, as conceded by the Government on page 16 of its Brief in the Court of Appeals below, when the Suburban State Bank closed out its account after clearing all checks, it issued Doherty a cashier's check representing final proceeds of "collected funds" of

$80,665.18.

The real problem for Mr. Doherty occurred when after some of the Suburban State checks had "bounced" on his stock brokers, the street value of the stocks they held for Mr. Doherty in street name declined sharply on a late Friday afternoon in November of 1987. The brokers deemed themselves insecure and exercised their contractual right to "cover" and sold Doherty's stock, without his knowledge, at a substantial loss.

Mr. Doherty immediately called his commercial banker, explained what had happened and came to an agreement with his commercial banker. He would deposit with M&I the balance of net sale proceeds of $62,812.36, and the M&I Bank, which had already covered his overdrafts, would convert this informal unsecured loan to a formal secured loan of some $30,000. The banker reduced the agreement to writing

and both he and Mr. Doherty signed it.

After signing the agreement and **after** Mr. Doherty had deposited the net sale proceeds, a superior of the loan officer instructed him that the bank was to renig on the agreement. At the time of that breach of contract the M&I Bank had sustained at most a shortfall of a little over $30,000. Doherty thereupon consulted a senior partner in the largest and most prestigious law firm in the State of Wisconsin, Foley & Lardner, after being referred to them by the Lawyer Referral Service of the State Bar Association of Wisconsin. Their advice was to attempt a "stop payment" on the $62,812.36 check which had been deposited by Mr. Doherty in reliance upon the earlier contractual representations of the loan officer.

Mr. Doherty followed this advice and the "stop payment" order was honored. Subsequent civil actions brought by the

M&I bank challenging this action were unsuccessful. [See: Result in M&I *Bank v. National Financial Services, et al,* Case No. 88-C-120 (E.D. Wis.)] Thus, the "loss" generated by any allegedly illegal conduct on the part of Patrick J. Doherty, should have been limited to some $30,000. There was absolutely nothing illegal or unlawful about the stop payment of the deposited sale proceeds on the advice of counsel. That was not an unlawful act by the defendant. It was in complete conformity with the law.

This was not a case of writing checks on "air." The government completely ignores the other side of the balance sheet. Mr. Doherty's payees on his checks were brokerage houses who converted cash to stock and *vice versa*. His New England Securities account showed sales proceeds generated of $192,874.12 during October, November and December of 1987. His

Dominick Investors account showed sale proceeds of $44,828.28. No brokerage house sustained any loss and $62,812.36 excess cash sale proceeds was returned to Mr. Doherty after paying off all margins, costs and commissions.

To be sure, there was not enough cash to completely cover the overdraft at the M&I Bank due to the dip in stock values. But that was not the result of criminal activity. That was the result of subsequent changes in the value of the stocks. If the shares had been liquidated on a different day at higher prices, there would have been no loss to the M&I Bank for having chosen to cover Mr. Doherty's overdrafts when he initially purchased the shares. How can criminality of Mr. Doherty's conduct as a matter of law depend upon fluctuations in stock prices?

The fundamental point to be born in mind is that a bank, as a matter of law,

is not entitled to view deposited checks in its accounts as anything other than an expectancy until they become "collected funds." A bank has no obligation to honor drafts drawn on its customer's account except from "collected funds" and deposits are not "collected funds" until they are a full and final credit between banks.

Passage by Congress of *18 U.S.C. §1344* did not change the Uniform Commercial Code, no matter how much the Government wishes that were the case. In order to convict a person under *18 U.S.C. §1344*, something more than a series of N.S.F. checks between two banks to extend the "float" time must exist. The indictment, the plea agreement, the stipulation at sentencing and the government's offer of proof at sentencing all were limited to "checks" as the sole actionable criminal conduct of this defendant. No other conduct was alleged upon which to base any

claim of fraudulent intent.

In footnote 6 of the majority opinion at 458 U.S. 285 the *Williams* court indicated its clear preference that "garden variety" bank fraud cases involving worthless checks be dealt with by state courts:

> Unlike many state statutes that do proscribe conduct such as that engaged in by petitioner, the federal scheme obviously does not in terms reach the deposit of checks that are supported by insufficient funds. [citing to *38 Mo.L.Rev. 432* (1973)]

Williams is not an isolated case. It was an intentional, broad announcement of federal policy by the United States Supreme Court which is the "supreme law of the land." It was ruling as a matter of public policy and federal judicial economy that "garden variety" N.S.F. check cases are more properly the province of state

court enforcement.

C. THE INDICTMENT IS LEGALLY DEFICIENT UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE

If the government of the United States is intent upon randomly charging persons with federal bank fraud in N.S.F. or other garden variety "check-kite" cases, then it is incumbent upon that government to notify its citizenry at some place and time what the essential elements of criminal "check-kite" are.

There is no pattern jury instruction for "check-kiting" anywhere. There is some case law attempting to define the term "check-kiting" but it is not consistent.

1. Non-Conformity with Federal Rule of Criminal Procedure 8(a)

The indictment here was phrased in the conjunctive, thus requiring the government to prove that the facts alleged constituted **both** a scheme to defraud **and** a

scheme to obtain money by "false pretenses." The defendant's Motion to Dismiss timely attacked this deficiency. The district court rejected this argument but on appeal the government conceded and the Circuit Court of Appeals unequivocally adopted the position that *18 U.S.C. §1344* contains two entirely distinct and separate crimes, one of which the government could not proceed upon against Doherty in light of *Williams v. U.S.* [969 F.2d 427-428]

Thus, the indictment here failed to conform to the specificity requirements of Federal Rule of Criminal Procedure 8(a) because the two crimes were not charged in separate counts. There can be no doubt now that entirely separate elements existed for the two closely related crimes charged. What those elements are, however, has not yet been defined. Accordingly, the defendant has not yet had the opportunity

to plead to a proper indictment. [See *Bins v. U.S.*, 331 F.2d 390 (5th Cir. 1964) cert. denied 379 U.S. 880; *U.S. v. Pavloski*, 574 F.2d 933 (7th Cir. 1978)]] The instant indictment thus contains duplicity because each of the counts alleged contains two distinct offenses with separate elements, one of which the Circuit Court of Appeals has now ruled cannot lie as a matter of law. Given the language of F.R.Cr.P. 8(a) and the Fifth and Sixth Amendments to the United States Constitution, the indictment must at a minimum be dismissed. *U.S. v. Frankel*, 721 F.2d 917 (3rd Cir. 1983).

2. The Need to Define Criminal Check-Kiting"

There is more than a little confusion in the federal judiciary as to what the core elements of criminal "check-kiting" entail.

The government's view as reflected in the indictment filed here, focuses exclusively on the state of the defendant's bank account at the time of writing each draft, rather than the time of presentment of each draft for payment or the existence of alternate resources to cover the instrument if dishonored by the drawee bank. Both of these closely related but separate issues are legally important for federal criminal law purposes if any person is to have adequate legal representation. The government simply assumes a requirement that actual sufficient funds be on deposit in an account at the time a draft is written rather than merely available or expected.

Under the facts of the instant case, Mr. Doherty had a $5,000 line of credit to cover fluctuations in the price of his stock and, at any given point, the payees of his checks either possessed the stock

shares themselves, the proceeds of such stock sales, or funds from Mr. Doherty's banks. If the bank honored Doherty's checks to the payees he then owned the shares of stock to cover his drafts when the stock was liquidated.

As early as 1960 the U.S. Court of Appeals for the 9th Circuit, in *B.A. Williams II v. U.S.*, 278 F.2d 535 (9th Cir. 1960) had ruled that the essential test for a "check kite" conviction under *18 U.S.C. §1341* was **not** whether the defendant had knowledge of insufficient funds in his bank account at the time of writing a check, but rather, whether at the time of writing he had reasonably available resources to cover by the time of presentment for payment. The U.S. Court of Appeals stated in *B.A. Williams*:

> Even where the defendant has knowledge of lack of funds at the

> time the check is drawn, fraudulent intent is negatived by proof that he had a reasonable expectation that deposits would cover the check at the time it was presented for payment. (omitting citations)
> The expectation of the defendant must, however, be more than mere hope. The circumstances must be such as to justify a reasonably certain belief that funds will be available. *B.A. Williams,* supra 278 F.2d 535 at 537.

This analysis continues to have vitality to this day, as reflected in more recent case law. In *U.S. v. Unruh,* 855 F.2d 1363 at 1373 (9th Cir. 1987) the Court of Appeals succinctly reiterated:

> "A person is not guilty of kiting checks if he reasonably expects that funds sufficient to cover the check will be deposited by the time it is presented to the payor bank for payment."

A similar view emerges in footnote 8 of

the U.S. Supreme Court decision in *Williams v. U.S.*, supra, as well as in the first paragraphs of Justice Marshall's dissent in *Williams*, all to the effect that a defendant who knowingly writes a check on an account containing insufficient funds is expressly identified as outside the scope of the criminal law ***if*** the drawer had the good faith ability to cover the check in due course from other available sources. [See: *Williams, supra*, 458 U.S. at 287 fn. 8, 73 L.Ed.2d 774 fn. 8; and 458 U.S. at 292, 73 L.Ed.2d at 778]

All of this discussion becomes highly material to the case at bar because if the instruments identified in the indictment were paid by the respective banks as written and within the window of time reflected in the indictment, Mr. Doherty had marketable securities available for liquidation, in the hands of the payees

themselves, and indeed, engaged in reduction of those securities to cash amounts exceeding any of the items complained of as overdraft checks.

The government, the trial court and the Circuit Court of Appeals here all have found unnecessary any negative allegation in the indictment as to Mr. Doherty's ability or good belief of his ability to cover checks if dishonored when presented. These are elements of the government's case which the government identified as "irrelevant." The question is not merely a jury issue as originally theorized by the District Court. This is an issue of law which the courts below disagree upon as an essential element of the government's case to prove in criminal "check-kiting."

In this vacuum the defendant turned to the Federal Criminal Jury Instructions for the Seventh Circuit, Vol. II Ch. 63, p. 90 (1983). The phrase "scheme to defraud" is

defined there and it is the exact phrase used in *18 U.S.C. 1344(1).*

The pattern 7th Circuit Jury Instruction reads as follows:

> "A scheme means some plan or course of action intended to deceive another **and** to deprive another of something of value by means of false pretenses, representations, or promises."

This 7th Circuit Jury Instruction is highly relevant because the operative language of *18 U.S.C. §1344* was lifted directly from, and is identical to, *18 U.S.C. §§1341 and 1343;* and the cases and law interpreting them is typically used to interpret and apply *§1344.* [See:*U.S. v. Greene*, 670 F.Supp. 337, at 340 (M.D. Fla. 1986)] Thus, this particular 7th Circuit instruction defining "scheme to defraud" clarifies that under either the *§1344(1)* "scheme to defraud" language or the

§1344(2) "scheme to obtain money by false representations" language, a false statement or false representation must exist. If the writing and depositing of checks is not a "representation of fact" then the indictment must fall because it alleges no other operative acts on the part of the defendant. [See also: *U.S. v. Feldman*, 711 F.2d 758 at 764-65 (7th Cir. 1983) cert. denied, 464 U.S. 939, 104 S.Ct. 352 (1983)]

The 7th Circuit, however, in the case at bar, now rejects its own pattern jury instruction as "never intended to have the force of law in this Circuit." With all due respect, how can a defense lawyer adequately represent and advise a citizen charged with violating *18 U.S.C. §1344* when there is no reliable definition of the offense charged? Indeed, one of the three circuit court panelists deciding the case and sitting by designation in this

case (Hon. John C. Shabaz) is a district judge in the Western District of Wisconsin whose standing pre-trial order in all criminal cases absolutely requires the use of the pattern 7th Circuit Jury Instruction if one exists.

As a final comment, the Court of Appeals here attempts to find strength citing five other circuit's decisions as being in accord with their own rendered here. (969 F.2d at 428) However, rather than clarifying the law, a careful review of each of those decisions shows (a) utter disregard for fundamental principles of *stare decisis* and the "supremacy clause" in failing to follow this Court's clear and unequivocal policy decision in *Williams* and (b) incredible vagueness as to the elements of an illegal "check-kite" scheme. See also *U.S. v. Bales,* 813 F.2d 1289 (4th Cir. 1987) for internal conflict within the Fourth Circuit with *U.S. v.*

Celesia, 945 F.2d 756 (4th Cir. 1991).

II. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN VACATING THE SENTENCE IMPOSED BY THE DISTRICT COURT UNDER THE FEDERAL SENTENCING GUIDELINES.

A. THE DISTRICT COURT CAREFULLY CONSIDERED ALL THE EVIDENCE AND POSITIONS OF BOTH THE GOVERNMENT AND DEFENSE COUNSEL IN IMPOSING SENTENCE.

The District Court held two evidenciary hearings in this matter, both of which adduced evidence relevant to sentencing. The first hearing was held on July 29, 1991 at which the defendant changed his initial plea of "not guilty" to "guilty" under Count One of the Indictment and in reliance upon a lengthy written plea agreement. The second hearing was lengthy and consisted of presentations of a formal presentence report, legal arguments by counsel, documentary evidence of bank account and trading account

balances, deposition testimony from the defendant's banker and testimony from the defendant himself.

The government identified the Base Offense Level applicable to Doherty's conduct as 6 and persuaded the trial court, over defense objections, that the applicable monetary loss amount was $96,721 rather than the defense position that the actual loss to the bank due to any alleged criminal conduct was in the low $30,000 range. This resulted in a 5 point enhancement of the offense. From this total of 11 points the government agreed that Doherty was entitled to a 2 point reduction for "acceptance of responsibility." However, the government was adamant that Doherty's conduct justified a 2 point enhancement back to 11 points for "more than minimal planning." [The reference source used was §2F1.1 Fraud and Deceit, p.87 Sent. Guidelines

1987 Ed., Oct. '87]

The District Court patiently heard all of the complex facts, interacted with the attorneys at length on the various points of law, including the government's fully articulated view of "more than minimal planning" in the context of Doherty's conduct. In fact, the court heard the elements of "more than minimal planning" as defined in the Commentary to §1B1.1(f) recited to it verbatim by the government. Accordingly, the District Court was fully apprised of the applicable law from the government's perspective.

B. THE DISTRICT COURT FOLLOWED THE PROVISIONS OF THE ENABLING STATUTE, 28 U.S.C. §994(j).

However, the district judge declined to follow the dictates of the government to their liking. The district court viewed this case as not a sufficiently "serious offense" given the defendant's first

offender status, the mitigating factors surrounding the stock market crash of October, 1987, and the legitimate issues raised relating to the degree of criminality of Doherty's conduct under *18 U.S.C. §1344*. In doing so the district court underscored that the Sentencing Guidelines are not and cannot be made superior to their enabling statute. The Guidelines are subservient to the mandates contained in the enabling statute. In particular, *28 U.S.C. §994(j)* specifically requires that the Sentencing Guidelines are to be applied by the District Courts in such a matter as to "... reflect the general appropriateness of imposing a **sentence other than imprisonment** in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense ...." (emphasis added)

Yet the government would have the Guidelines Comments override the enabling statute and the inherent powers of Article III courts of the United States to implement them. The government has strained the limits of its special limited appeal power here. It sought on appeal an 11 point sentence which would have as its mandatory result under the Sentencing Guidelines the requirement that the defendant serve at least one-half of the minimum confinement period in a federal prison and the balance in a community confinement facility (i.e. four months in prison and four months in a half-way house).

The District Court, after considering all of the facts and factors, imposed a sentence based upon 9 points. This reduced the minimum confinement period under the sentencing tables for a Category I (first offender) with an offense level of 9

points to four months **and** allowed the court in its discretion to substitute probation for prison, **provided** that some confinement conditions be imposed. The District Court thereupon imposed a sentence of two years probation which included two months of community confinement and two months of home detention, and ordered full restitution.

The resulting sentence therefore was the result of a thoughtful process of applying the Sentencing Guidelines carefully to the facts and utilizing the discretion delegated to the District Courts under *28 U.S.C. §994(j)* to have the punishment fit the crime. This hardly meets the *18 U.S.C. §3742(b)* "clear error" standard for "incorrect application of the sentencing guidelines."

C. THE COURT OF APPEALS DID NOT FOLLOW THE STANDARDS GOVERNING ITS SCOPE OF REVIEW UNDER 18 U.S.C. §3742(e).

Under *18 U.S.C. §3742(e)* an appellate court must give due regard to the opportunity of the district judge to have observed the defendant throughout all of the proceedings below. Further, in order to reverse there must be a "clearly erroneous" standard applied by the Court of Appeals, as well as "due deference" to the district court's findings of ultimate fact.

The trial court certainly did not depart from the guidelines here. Rather, a careful winnowing and sifting process occurred, where the Government won some of its "bonus points" and lost some. The sentence imposed was above the minimum but on the low end. The point level assessed allowed the judge the flexibility of choosing imprisonment or not (i.e. one

more point assessed would have taken away the judge's discretion on this factor unless the court then departed from the guidelines).

The pre-sentence report clearly identifies Mr. Doherty as a first time offender and the crime charged is certainly not one of "violence." Conspicuously absent from the Court of Appeals' decision is any reference to *28 U.S.C. §994(j)*, which expressly states in Congress' own words that the "Guidelines" are to reflect the general appropriateness of imposing a sentence "other than imprisonment" in cases where the defendant is a first time offender who has not been convicted of a crime of violence or an otherwise serious offense.

The assessment of points by the district court in this instance took Mr. Doherty up to the threshold where the court would have lost its ability to

implement the congressional statutory language of *28 U.S.C. 994(j)* in a case which appeared to fit within its parameters. The trial court then was able to harmonize the guideline's point system with the enabling statute, itself. The government, however wants more than this.

The Government's view of what constitutes an "incorrect application of the sentencing guidelines" is simply too broad. As the trial court noted in analyzing the situation at pages 39-40 of the Transcript of the Sentencing Hearing [R-28 - 29]:

> If I accept everything the government urges me to accept, the base offense level is six, to which 5 points are added because more than $70,000 was taken, which puts the defendant at 11. He gets two more points added because of the planning which brings him to 13. The government concedes he's entitled to two points as a

> subtraction because he accepted responsibility which brings us to level 11.
>
> The defense concedes that six is the proper base offense level. Arguing that less than $70,000 has been taken, a four point enhancement rather than five is necessary which puts the offense level at 10. The defense would have me award no penalty for planning but give the two points for acceptance of responsibility, then ending up at level 8.

The foregoing discussion is exactly the appropriate kind of analysis a judge is supposed to do under the sentencing guidelines. There was no departure from or arithmetic error here; no application of the wrong chronological version of the guidelines. It was a judicial decision of ultimate fact that certain conduct did not constitute "more than minimal planning."

Mr. Doherty's actions were not those of a sophisticated stock trader. He was a

novice in the stock market who became swallowed in its complexity at a highly volatile time. His "criminal" conduct is far more representative of a person reacting to external forces and third parties (i.e. Suburban State Bank going on a "collected funds basis"), fluctuating stock prices, brokers upset with N.S.F. checks, and his own business cash flow.

This was not a carefully crafted planned out series of cunning criminal acts. Any analysis of the decision making process of the district court in this context is necessarily fact intensive. Accordingly, this Court is referred back to the last sentence of *18 U.S.C. §3742(e)* relative to its obligations of "due deference" under the "clearly erroneous" standard. Indeed, the Sentencing Guideline in the October, 1987, version of these regulations at Application Note 11 p. 89. recognizes that the "seriousness"

of an offense involving market value of securities may, in-fact, be overstated if a decline in value of the securities causes a loss "**where the decline in stock value occurs due to reasons unrelated to the offense.**" Thus, the trial court was well within its bounds to look to the element of market volatility of the stocks as a mitigating element when addressing the "seriousness" of the offense under *28 U.S.C. 994(j)*, whether as a part of deducing "loss" points or "more than minimal planning" points.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this cause.

Dated at Milwaukee, Wisconsin, this 21st day of October, 1992.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 91-3291 & 91-3352

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Cross-Appellant,

v.

PATRICK J. DOHERTY,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 91-CR-41—**Terence T. Evans**, *Chief Judge.*

ARGUED FEBRUARY 26, 1992—DECIDED JULY 24, 1992

Before FLAUM and KANNE, *Circuit Judges*, and SHABAZ, *District Judge.**

FLAUM, *Circuit Judge.* In late 1987 Patrick J. Doherty, virtually broke but eager to invest in a stock market depressed by the crash of October 1987, engaged in a "check kiting" scheme to generate some investment capital by artificially inflating his checking account balance. The scheme worked as follows: Doherty maintained two checking ac-

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* The Honorable John C. Shabaz, Western District of Wisconsin, sitting by designation.

counts, one at the M & I Marshall & Ilsley Bank of Milwaukee, Wisconsin (M & I) and the other at the Suburban State Bank of Hartford, Wisconsin (Suburban). On November 5, he purchased some stock, paying his brokerage house with a $27,123.32 check drawn against his M & I account, which at the time had a balance of no more than a few hundred dollars. To cover the impending overdraft, the following day Doherty deposited in that account a $27,123.32 check drawn against his Suburban account. The Suburban account also held insufficient funds, so Doherty then deposited in that account another $27,123.32 check, this one drawn against his M & I account. Three days later he deposited in his M & I account a $27,233.00 check drawn against his Suburban account. He kept the kite afloat in like manner for about a month, raising the stakes at times and writing about 40 bad checks in all. Finally, a banking official at Suburban realized what was happening and closed Doherty's account. The brokerage house, realizing the same, liquidated his portfolio. M & I acted last, and was left holding the bag to the tune of $96,721.00.

A federal grand jury subsequently indicted Doherty for bank fraud under 18 U.S.C. § 1344. Doherty filed a motion to dismiss, asserting that the facts alleged in the indictment did not constitute a criminal offense under that provision. The district court denied the motion, *United States v. Doherty*, No. 91-CR-41 (E.D. Wis. June 17, 1991), and Doherty thereafter entered a conditional guilty plea in which he reserved the right to appeal the court's ruling. Fed. R. Crim. P. 11(a)(2). In imposing sentence, the court rejected the government's contention that Doherty's offense involved "more than minimal planning," and hence declined to impose a two-level enhancement under § 2F1.1(b)(2)(A) of the Sentencing Guidelines. Both parties appeal. We affirm Doherty's conviction, vacate his sentence, and remand to the district court for resentencing.

I.

The indictment returned against Doherty alleged only that he engaged in a check kiting scheme between two

federally insured banks by knowingly drafting and depositing a series of overdraft checks. We must determine whether the district court correctly concluded that such a bare check kiting scheme—meaning a check kiting scheme unadorned by any other acts or communications to the drawee bank or banks—constitutes bank fraud under § 1344. This is an issue of law, which we review *de novo*.

The version of § 1344 in effect at all relevant times provides as follows:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice
> (1) to defraud a financial institution, or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
> shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both.

18 U.S.C. § 1344 (West Supp. 1990). The statute, which reads in the disjunctive, establishes two distinct, albeit closely related, offenses: (1) schemes to defraud financial institutions; and (2) schemes to obtain money, etc., from financial institutions by false pretenses, representations or promises. *See United States v. Medeles*, 916 F.2d 195, 198 (5th Cir. 1990); *United States v. Bonnett*, 877 F.2d 1450, 1453-54 (10th Cir. 1989).

The government concedes that Doherty did not violate § 1344(2), a wise concession given *Williams v. United States*, 458 U.S. 279 (1982). That case held that check kiting is not an offense under another federal bank fraud statute, § 1014, which prohibits the making of "any false *statement or report* . . . for the purpose of influencing in any way the action of" certain enumerated financial institutions. 18 U.S.C. § 1014 (1982) (amended 1989, 1990) (emphasis supplied). The government in *Williams* had argued that the defendant's drafting and deposit of an overdraft check was a "false statement" because it impliedly

represented that the check was covered by sufficient funds in the defendant's checking account. The Court disagreed, reasoning that the defendant's action was not a "false statement" because a check "is not a factual statement at all," but rather an order to the drawee bank to pay a sum certain to the holder. *Id.* at 284. In other words, a check does not "make any representation as to the state of [an account holder's] bank balance," and hence cannot be characterized as true or false. *Id.* at 284-85.

Section 1344(2), which covers schemes accomplished "by means of false or fraudulent pretenses, representations, or promises," is akin to § 1014, which covers "false statement[s] or report[s]," in that both reach only those acts that involve some misrepresentation or false assertion of fact. *Cf. United States v. Kucik*, 844 F.2d 493, 500 (7th Cir. 1988) ("false statements" under § 1014 most likely indistinguishable from "false pretenses" under 18 U.S.C. § 2113(b)). Consequently, *Williams'* holding that a bare check kiting scheme cannot offend § 1014 because it does not state or assert anything applies with equal force to § 1344(2). *See United States v. Falcone*, 934 F.2d 1528, 1540-41 (11th Cir.) (dicta) *vacated on other grounds, reh'g en banc granted*, 939 F.2d 1455 (1991), *reinstated in relevant part*, 960 F.2d 988 (1992) (en banc); *Medeles*, 916 F.2d at 201; *cf. Kucik*, 844 F.2d at 500 (check kiting does not constitute theft by false pretenses under 18 U.S.C. § 2113(b)); *United States v. Cronic*, 900 F.2d 1511, 1516 (10th Cir. 1990) (check kiting scheme does not violate "false representations" clause of mail fraud statute, 18 U.S.C. § 1341); *United States v. Frankel*, 721 F.2d 917, 919 (3d Cir. 1983) (same). We agree with the parties that the allegations in Doherty's indictment cannot constitute an offense under § 1344(2).

If § 1344 prohibits bare check kiting, then, it can do so only under § 1344(1), which prohibits "scheme[s] or artifice[s] to defraud . . . financial institution[s]." Five Circuits have expressly addressed this issue, and all have ruled that check kiting schemes involving two or more financial institutions fall within the scope of § 1344(1). *United States v.*

Stone, 954 F.2d 1187, 1189-91 (6th Cir. 1992); *United States v. Fontana*, 948 F.2d 796, 802 (1st Cir. 1991); *United States v. Celesia*, 945 F.2d 756, 758-59 (4th Cir. 1991); *United States v. Schwartz*, 899 F.2d 243, 246-47 (3d Cir.), *cert. denied*, 111 S. Ct. 259 (1990); *Bonnett*, 877 F.2d at 1454-56. The District of Columbia, Eleventh and Fifth Circuits have noted their agreement in dicta. *United States v. Sayan*, 1992 U.S. App. LEXIS 14239, slip op. at 16 n.7 (D.C. Cir. June 23, 1992); *Falcone*, 934 F.2d at 1541 n.30; *Medeles*, 916 F.2d at 201. The question remains open in this Circuit. *United States v. Taggatz*, 831 F.2d 1355 (7th Cir. 1987), affirmed the conviction of a check kiter under § 1344, but did not reach the issue raised by Doherty herein. We once mentioned in passing that § 1344 probably prohibits bare check kiting, *Kucik*, 844 F.2d 499-500, but language in passing does not establish the law of the Circuit. *United States v. House*, 808 F.2d 508, 511 (7th Cir. 1986).

In finally determining for ourselves the scope of § 1344(1), we see no reason to disturb the consensus. We look first to the language of the statute, *Hughey v. United States*, 495 U.S. 411, 415 (1990), and assume that its plain meaning "accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). The plain meaning of "scheme" is a "design or plan formed to accomplish some purpose," Black's Law Dictionary 1344 (6th ed. 1990), or "a plan, design, or program of action to be followed." The Random House College Dictionary 1177 (rev. ed. 1980). To "defraud" means "[t]o practice fraud," "to cheat or trick," Black's, *supra*, at 483, or "to deprive of a right or property by fraud," Random House, *supra*, at 349; "fraud" means "deceit, trickery, or breach of confidence, used to gain some unfair or dishonest advantage." *Id.* at 526. Check kiting, at root, is a plan designed to separate the bank from its money by tricking it into inflating bank balances and honoring checks drawn against accounts with insufficient funds. *See Williams*, 458 U.S. at 281 n.1 (explaining mechanics and object of check kiting). It certainly is encompassed within the ordinary meaning of the term "scheme to defraud."

Doherty does not address the plain meaning of § 1344(1)—nor, for that matter, does the government—but contends nonetheless that one cannot execute a scheme to defraud without making a false statement or misrepresentation of fact. In support, Doherty points to the Seventh Circuit's pattern jury instructions for mail and wire fraud prosecutions under 18 U.S.C. §§ 1341 and 1343, respectively; these instructions define "scheme to defraud" as "some plan or course of action intended to deceive another and to deprive another of something of value by means of *false pretenses, representations, or promises.*" II *Federal Criminal Jury Instructions (Seventh Circuit)*, ch. 63, at 90 (1983) (emphasis supplied). Because Congress patterned § 1344 after §§ 1341 and 1343, Doherty argues, a false representation or promise is the *sine qua non* of a "scheme to defraud" under § 1344(1); accordingly, under *Williams*, check kiting is no more a crime under § 1344(1) than it is under § 1344(2).

We agree with Doherty that "scheme to defraud" means the same thing under §§ 1341, 1343 and 1344, but our agreement ends there, for we are not persuaded that the term has as cramped a meaning as he contends. Granted, the Seventh Circuit's pattern jury instructions support a restrictive interpretation. However, those instructions, while carrying some weight, were never intended to have the force of law in this Circuit. *See* II *Federal Criminal Jury Instructions*, *supra*, at v (letter from Judicial Council of the Seventh Circuit) ("we cannot and do not approve in advance the instructions . . . in any particular case"). Indeed, we have explicitly recognized—both before and after publication of those instructions—that a course of conduct not involving any factual misrepresentation can be prosecuted as a "scheme to defraud" under the mail and wire fraud statutes. *See, e.g., United States v. Richman*, 944 F.2d 323, 332 & n.10 (7th Cir. 1991); *Fournier v. United States*, 58 F.2d 3, 5 (7th Cir.), *cert. denied*, 286 U.S. 565 (1932).

This should come as no surprise. As its ordinary meaning suggests, the term "scheme to defraud" describes a

broad range of conduct, some which involve false statements or misrepresentations of fact, *see, e.g., United States v. Church*, 888 F.2d 20, 23 (5th Cir. 1989), and others which do not. *See, e.g., Cronic*, 900 F.2d at 1513-14. This was commonly understood in 1984 when Congress enacted § 1344. *See, e.g., United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981); *United States v. Bruce*, 488 F.2d 1224, 1229 (5th Cir. 1973), *cert. denied*, 419 U.S. 825 (1974); *Fournier*, 58 F.2d at 5; *Kaufmann v. United States*, 282 F. 776, 779 (3d Cir.), *cert. denied*, 260 U.S. 735 (1922). In construing § 1344(1), we must presume that Congress was aware of the settled judicial interpretation of "scheme to defraud" under §§ 1341 and 1343, and that it intended to incorporate that interpretation when enacting § 1344. *Moskal v. United States*, 111 S. Ct. 461, 468 (1991); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) (when a term is "transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it"). The aforementioned pattern jury instructions notwithstanding, one need not make a false representation to execute a scheme to defraud. Accordingly, we conclude that the language of § 1344(1) unambiguously encompasses bare check kiting schemes.

When the language of a statute is lucid, we examine the legislative history only to see whether it reflects "a clearly expressed legislative intention to the contrary." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The legislative materials surrounding the passage of § 1344(1) confirm, rather than refute, our conclusion regarding its scope, for they clearly evince Congress' desire to enact a federal check kiting statute in the wake of *Williams*. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 377-78 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3517-19; *Bonnett*, 877 F.2d at 1454; John F. Wagner, Jr., Annotation, *What Constitutes Violation of Federal Bank Fraud Statute (18 U.S.C. § 1344)*, 99 A.L.R. Fed. 888, 891-92 (1990). We therefore join the First, Third, Fourth, Sixth

and Tenth Circuits in holding that the government may prosecute bare check kiting schemes under § 1344(1).

Doherty's raises an additional argument regarding the sufficiency of the facts alleged in the indictment, but it merits no separate discussion.

II.

At sentencing, the district court declined to adopt the presentence report's recommendation to enhance Doherty's sentence by two levels for "more than minimal planning." *See* U.S.S.G. § 2F1.1(b)(2)(A), cross-referencing § 1B1.1, application note 1(f) (definition). The government appeals this decision, which we review for clear error. *United States v. Lennick*, 917 F.2d 974, 979 (7th Cir. 1990); *United States v. White*, 903 F.2d 457, 466 (7th Cir. 1990).

Doherty's check kiting scheme spanned approximately one month, and during that time he wrote approximately 40 checks—none supported by sufficient funds—to keep the kite afloat. In ruling that these activities did not involve "more than minimal planning," the district court reasoned as follows:

> As to more than minimal planning, implicit in this type of an offense in my view is planning. . . . And although it's a close question I think that more would have been necessary here to have been done to go on top of the adjusted range to apply two more points for planning. All of the acts here were part and parcel of committing bank fraud. And there isn't anything here that is unusual in my view that would qualify for a further enhancement.

Sentencing Tr. at 44. We believe that the court's analysis did not properly apply the Guidelines.

The Guidelines identify three types of situations that warrant a "more than minimal planning" enhancement. U.S.S.G. § 1B1.1, application note 1(f); *United States v. Maciaga*, No. 91-3075, slip op. at 5 (7th Cir. June 8, 1992). The district court focused on only one, crimes that involve

"more planning than is typical for commission of the offense in a simple form," and determined that Doherty's activities did not involve more planning than would a typical check kiting or bank fraud scheme. While one could certainly have concluded otherwise as an original matter, we defer to the district court's finding on this issue. *See United States v. Mount*, No. 92-1087, slip op. at 5-6 (7th Cir. June 25, 1992). The Guidelines, however, also direct district courts to impose the enhancement if the offender's crime involved "repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. § 1B1.1, application note 1(f); *Maciaga*, slip op. at 6-7. Drafting 40 overdraft checks during a single month, few if any of which appear to have been purely opportune, arguably fits this profile. The district court committed clear error by declining to consider the applicability of this prong of the "more than minimal planning" enhancement. We vacate Doherty's sentence and remand for resentencing to give the court an opportunity to do so.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—7-24-92

UNITED STATES DISTRICT COURT
Eastern District of Wisconsin

United States of America

v.

Patrick J. Doherty

(name of defendant)

Judgment in a Criminal Case (For offenses Committed on or after Nov. 1 1987)

Case No.91-CR-41

Joseph F. Owens

Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1

____ was found not guilty on count(s)____

after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title and Section	Nature of Offense
18:1344	Bank Fraud, a Class C Felony

Date Offense Concluded	Count Number(s)
12/2/87	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

____ The defendant has been found not guilty on count(s)_____ and is discharged as to such count(s).

__X__ Count(s) ____2&3____ (is)(are) dismissed on the motion of the United States.

__X__ It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) ___1___, which shall be due ____X____ immediately _____ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney

for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc.Sec. No.: 387-70-9509

Defendant's Date of Birth: 11/26/58

Defendant's Mailing Address:

_____

_____

Defendant's Residence Address:

37736 Sunset Drive

Oconomowoc, WI 53066

10/1/91 Date of Imposition of Sentence

/s/ Terence T. Evans, Chief Judge

Signature of Judicial Officer

Terence T. Evans, Chief Judge

Name & Title of Judicial Officer

10/1/91

Date

PROBATION

The defendant is hereby placed on probation for a term of 2 years. While on probation, the defendant shall not commit another Federal, state or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

The defendant is to serve 2 months in community confinement followed by 2 months of home detention. All to be served with work release privileges pursuant to

18:4082(c)(2).

If notice of appeal is filed, sentence will be stayed pending appeal.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the

probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or

administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

_X_ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
M&I Bank	$96,721.00

Payments of restitution are to be made to:

___ the United States Attorney for transfer to the payee(s).

___ the payee(s).

Restitution shall be paid:

___ in full immediately.

___ in full not later than _____

___ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

____in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

___ The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

____ The court adopts the factual findings and guideline application in the presentence report.

OR

__X__ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

see transcript

Guideline Range Determined by the Court:

Total Offense Level 9

Criminal History Category: I

Imprisonment Range: 4 to 10 months

Supervised Release Range: to _____ years

Fine Range: $_____ to $_____

__X__ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 96,721.00

___ Full restitution is not ordered for the following reason(s):

___ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to

depart from the sentence called for by application of the guidelines.

OR

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

___ upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reason(s):

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No.

91-Cr-41

PATRICK J. DOHERTY,

Defendant.

ORDER

In 1982, the United States Supreme Court threw out the conviction of William Archie Williams for check kiting. Today, Patrick J. Doherty hopes I will do the same with the indictment against him.

Williams was charged under 18 U.S.C. §1014, which makes it a crime to

> knowingly make any false statement or report, or willfully overvalue any land, property or security, for the

> purpose of influencing in any way the action of [certain financial institutions] upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan ....

Williams v. United States, 458 U.S. 279 (1982). The court said that although Williams had indeed deposited in various accounts several checks which were not supported by sufficient funds, presenting a check to a bank did not constitute a "false statement." A check, the Court said, is not a "factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" At 284. The upshot of the decision was that classic check kiting cases could not be prosecuted under section 1014.

Congress went to work to correct the gap in the federal prosecutor's arsenal created by the Williams decision. As part

of the Comprehensive Crime Control Act of 1984, Congress passed what is now 18 U.S.C. §1344, a bank fraud statute. This is the statute under which Mr. Doherty has been indicted in this case.

Section 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice --
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both.

The statute sets forth, in the disjunctive, two ways to commit the crime. The first is simply to scheme to defraud a financial institution. There is no requirement that the fraud be in the form of a statement or report, as there is in section 1014. The second refers to obtaining a benefit by false or fraudulent pretenses, representations, or promises, not simply statements or reports. Because the statute makes it a crime to knowingly execute, or attempt to execute, a scheme to defraud a financial institution -- without regard to making false statements -- Williams is in apposite. See United States v. Schwartz, 899 F.2d 243 (3rd. Cir. 1990).

As an aside, I will mention that some of Mr. Doherty's arguments in support of his request to dismiss the indictment are more properly viewed as possible defenses to the charge for consideration by the

jury.

IT IS THEREFORE ORDERED that Mr. Doherty's motion to dismiss the indictment is DENIED.

Dated at Milwaukee, Wisconsin, this 17 day of June, 1991.

BY THE COURT:

/s/ Terence T. Evans

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No.91-CR-41

PATRICK J. DOHERTY,

Defendant.

MOTION TO DISMISS

NOW COMES the defendant, Patrick J. Doherty, by his attorney, Joseph F. Owens of ARTHUR & OWENS, S.C., and respectfully moves this court for the entry of an order dismissing the indictment issued herein against the defendant, Patrick J. Doherty, in that the indictment fails as a matter of law to contain allegations which constitute a violation of *18 U.S.C. §1344*

and is therefore jurisdictionally defective. The basis for this motion is contained in the Memorandum of Law filed contemporaneously with this motion.

Dated this 8th day of May, 1991.

ARTHUR & OWENS, S.C.
Attorneys for defendant

By: /s/
Joseph F. Owens

Mailing Address:
2665 S. Moorland Rd.
Suite 200
New Berlin, WI 53151
(414) 785-0320

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Case No.91-Cr-41

[Title 18 U.S.C. §§ 2 & 1344]

v.

PATRICK J. DOHERTY,

Defendant.

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. At all times material to this indictment:

a. The M&I Marshall & Ilsley Bank of Milwaukee, Wisconsin ("M&I Bank"), was a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation;

b. The Suburban State Bank, now known as the Valley Bank Southeast of Hartford, Wisconsin ("Valley Bank"), was a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation; and

c. The defendant, Patrick J. Doherty, was an insurance agent employed by the New England Life Insurance Company of Milwaukee, Wisconsin.

2. Beginning on or about November 5, 1987 and continuing thereafter until on or about December 2, 1987, in the State and Eastern District of Wisconsin,

PATRICK J. DOHERTY

the defendant herein, did knowingly and willfully execute a scheme to defraud the M&I Bank and the Valley Bank and to obtain money from those financial institutions by means of false and

fraudulent representations. The scheme is described with particularity as follows:

3. It was a part of the scheme that the defendant opened and maintained a personal checking Account No. 22-25-6319 in the name of Patrick J. Doherty at the M&I Bank.

4. It was a part of the scheme that the defendant opened and maintained a personal checking Account No. 55-40-3252 in the name of Patrick J. Doherty at the Valley Bank.

5. It was a part of the scheme that the defendant wrote certain checks drawn on his personal checking account at the M&I Bank and deposited those checks into his personal checking account at the Valley Bank. At approximately the same time, the defendant wrote certain checks on his personal checking account at the Valley Bank, in amounts

approximately equal to the deposits from his personal checking account at the M&I Bank, and deposited those checks back into his personal checking account at the M&I Bank.

6. It was a part of the scheme that the bank into whose account the defendant had deposited a check then credited the personal checking account in the amount of the deposited check, prior to the time that the bank against whose account the check was drawn deducted the amount of the check from the personal checking account at that bank. As a result, the defendant artificially inflated the actual balances of monies on deposit in his personal checking accounts at both the M&I Bank and the Valley Bank.

7. It was a part of the scheme that, beginning on or about November 5, 1987, and continuing thereafter until on or

about December 2, 1987, the defendant wrote checks against his personal checking accounts at the M&I Bank and at the Valley Bank in various amounts, including several ranging from approximately $22,000.00 to $38,000.00.

8. It was a part of the scheme that the defendant wrote checks against his personal checking account at either the M&I Bank or at the Valley Bank and thereafter deposited them into his personal checking account at either the Valley Bank or at the M&I Bank, in part, to enable him to purchase certain commercial stocks, bonds, or other securities then being traded publicly.

9. It was a part of the scheme that, as a result of his writing checks against and thereafter depositing them into his personal checking accounts at the M&I Bank or the Valley Bank, the defendant was able to and did obtain

approximately $96,721.00, to which he was not entitled and to which he had no legitimate claim.

Execution of the Scheme

10. As one of the ways in which the defendant executed the scheme to defraud, on or about November 6, 1987, in the State and Eastern District of Wisconsin,

PATRICK J. DOHERTY

the defendant herein, deposited into his personal checking account No. 22-25-6319 at the M&I Bank, check No. 2351 in the amount of $27,123.32, drawn against his personal checking account No. 55-40-3252 at the Valley Bank;

All in violation of Title 18, United States Code, Sections 2 and 1344.

COUNT TWO

11. Paragraphs 1 through 9, set forth in Count One of this indictment, are incorporated by reference into Count

Two of this indictment.

12. As one of the ways in which the defendant executed the scheme to defraud, on or about November 7, 1987, in the State of the Eastern District of Wisconsin,

PATRICK J. DOHERTY

the defendant herein, deposited into his personal checking account No. 55-40-3252 at the Valley Bank, check No. 1129 in the amount of $27,132.32, drawn against his personal checking account No. 22-25-6319 at the M&I Bank.

All in violation of Title 18, United States Code, Sections 2 & 1344.

COUNT THREE

13. Paragraphs 1 through 9, set forth in Count One of this indictment, are incorporated by reference into Count Three of this indictment.

14. As one of the ways in which the defendant executed the scheme to

defraud, on or about November 10, 1987, in the State and Eastern District of Wisconsin,

PATRICK J. DOHERTY

the defendant herein, deposited into his personal checking account No. 22-25-6319 at the M&I Bank, check No. 2364 in the amount of $27,223.00, drawn against his personal checking account No. 55-40-3252 at the Valley Bank.

All in violation of Title 18, United States Code, Sections 2 and 1344.

/s/ John Kleats
Foreperson

Date: 2/21/91

/s/ John E. Fryatt
John E. Fryatt
United States Attorney
Date: 2/21/91